

Opening statement of Dr Johnny Ryan FRHistS, Senior Fellow of ICCL, to the Oireachtas Justice Committee, 27 April 2021.

Cathaoirleach, Members of the Committee,

I represent the Irish Council for Civil Liberties, Ireland's oldest independent human rights body. We have worked on data protection for decades.

The GDPR gave the Data Protection Commission (DPC) powers to proactively¹ investigate the misuse of data about us, and stop it. It can “obtain access to any premises”² and compel evidence.³ It can even force the biggest companies in the world to change what they do with our data.⁴

But systematic infringement of fundamental rights go unchecked by the DPC.

Three years ago, I blew the whistle to the DPC about “Real Time Bidding” (RTB), the largest data breach ever recorded.⁵ RTB allows data brokers to build illegal dossiers about us based on the private things we do online. This exposes us to manipulation and enables foreign electoral interference.⁶ The crisis is so acute that one of my evidence bundles to the DPC featured on the front page of *The Financial Times*.⁷

Despite this, three years on, the DPC recently told me it has not even completed a “statement of issues” of what it should investigate.⁸

Consider this sobering statistic: in the three years since the GDPR was applied, the Data Protection Commission (DPC) asserted its lead role in 196 cases, but delivered decisions (even draft decisions) in only four.⁹

In other words, the DPC has failed to resolve 98% of cases important enough to be of EU-wide concern.

That means Ireland is the bottleneck of GDPR investigation and enforcement against Google, Facebook, Microsoft, and Apple, everywhere in the EU.

ICCL has warned Government that the DPC's failure to uphold the rights of 448 million Europeans creates strategic economic and reputational risks for Ireland.¹⁰

Though we are a peripheral island, the GDPR gave Ireland the chance to become the key location for digital regulation.

But the DPC draws criticism¹¹ from the European Court of Justice,¹² the European Parliament,¹³ the authorities of Germany, France, Spain, Italy, the Netherlands, Austria, and Hungary,¹⁴ and last week, the CEO of the UK Competition Authority, too.¹⁵

DPC inaction has forced other EU Member States to sidestep Ireland.¹⁶ If this continues, we will lose our relevance as a regulatory centre. It also jeopardises a European Commission proposal that Ireland become the super regulator for another key part of the digital economy.¹⁷

And in the U.S., Senator Ron Wyden just introduced a draft Bill to designate jurisdictions with inadequate data protection enforcement as unfit to receive US data. We know from the drafters that this intentionally targets the DPC's enforcement failure. If Ireland is so designated, then every significant company here must stop processing data of customers in the U.S. until they obtain an export license from the U.S. Department of Commerce.¹⁸ This will be hard: the same restrictions are applied to nuclear material.¹⁹

Government must ensure Ireland meets its GDPR obligations. We propose two urgent steps.

First, appoint two new Commissioners, as provided for in the 2018 Data Protection Act, and designate a DPC Chair.²⁰

Second, establish an independent review of how to reform the DPC. Its problems may be due to more than just lack of investment: ICCL recently revealed that a major reform inside the DPC is chronically delayed,²¹ five years after being announced,²² and has cost the taxpayer over a million euro so far.²³

We must rebuild our DPC to protect us in the data age. We must restore Ireland's reputation as a regulatory leader. This is a moment of national opportunity, like Frank Aiken leading the world on nuclear non-proliferation in the middle of the last century. We must not squander it.

NOTES

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- ¹ GDPR Article 57(1)(a) and (i), and where a person asks for their help, Article 57(1)(f).
- ² GDPR Article 58(1)(f).
- ³ GDPR Article 58(1)(a) and (e).
- ⁴ GDPR Article 58(2)d and f.
- ⁵ "Submission to DPC: Two years on from complaint to the Irish Data Protection Commission, the RTB data breach is the largest ever recorded, and appears to have worsened", ICCL, 21 September 2021 (URL: <https://www.iccl.ie/wp-content/uploads/2020/09/1.-Submission-to-Data-Protection-Commissioner.pdf>), p. 16-18.
- ⁶ *ibid.*, pp 4-15.
- ⁷ "Google accused of covertly passing users' personal data to advertisers", The Financial Times, 5 September 2019, p. 1. I continued to supply evidence to the DPC after the initial evidence in September 2018, in the hope of stimulating some activity on its part.
- ⁸ In correspondence from DPC to AWO, solicitors acting for Dr Johnny Ryan, 19 March 2021. The "statement of issues" is a document that the DPC drafts to specify the matters it believes it should investigate.
- ⁹ We would not be aware of this sobering statistic unless the German Federal Data Commissioner had told us.
Ulrich Kelber to the LIBE Committee, "Schreiben von Frau Helen Dixon (DPC) vom 09.02. und 12.03.2021" 16 March 2021 (URL: (translation and original) http://www.iccl.ie/wp-content/uploads/2021/03/Letter-BfDI-LIBE-on-Irish-DPC_EN.pdf).
- ¹⁰ In two letters: i) ICCL to Minister for Justice Helen McEntee TD; Acting Minister for Justice Heather Humphreys TD; An Taoiseach Micheál Martin TD; Minister for Finance, Paschal Donohoe TD; Oireachtas Justice Committee; Martin Fraser, Secretary General, Department of the Taoiseach; Oonagh McPhillips, Secretary General, Department of Justice, 15 March 2021; and ii) ICCL to Minister for Justice, Helen McEntee, TD; Acting Minister for Justice, Heather Humphreys, TD; Minister for Finance, Paschal Donohoe, TD; An Taoiseach, Micheál Martin, TD; An Tánaiste and Minister for Enterprise, Trade and Employment, Leo Varadkar, TD; Martin Fraser, Secretary General, Department of the Taoiseach; Oonagh McPhillips, Secretary General, Department of Justice and Equality, 15 April 2021.
- ¹¹ See ICCL written submission to the Committee: "Economic & Reputational Risk of the DPC's Failure to Uphold EU Data Rights", ICCL, March 2021, pp. 10-12.
- ¹² "Opinion of Advocate General Bobek, Case C-645/19 Facebook Ireland Limited, Facebook Inc., Facebook Belgium BVBA v Gegevensbeschermingsautoriteit", 13 January 2021 (URL: <https://curia.europa.eu/juris/document/document.jsf?docid=236410&doclang=EN>), paragraph 114 and 135.
- ¹³ "Commission evaluation report on the implementation of the General Data Protection Regulation two years after its application", European Parliament, 2020/2717(RSP), (URL: [https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2020/2717\(RSP\)](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2020/2717(RSP))).
- ¹⁴ "Decision 01/2020 on the dispute arisen on the draft decision of the Irish Supervisory Authority regarding Twitter International Company under Article 65(1)(a) GDPR", European Data Protection Board, 9 November 2020 (URL: https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_bindingdecision01_2020_en.pdf).
- ¹⁵ Andrea Coscelli, speaking at Open Markets Institute, 20 April 2021, from minute 28:46 in video (URL: <https://www.openmarketsinstitute.org/publications/conference-after-google-and-facebook-the-future-of-journalism-and-democracy>).
- ¹⁶ See ICCL written submission to the Committee: "Economic & Reputational Risk of the DPC's Failure to Uphold EU Data Rights", ICCL, March 2021, pp. 8-9.

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- ¹⁷ On 15 December 2020 the European Commission proposed a Digital Services Act, which contemplates a mechanism like that in the GDPR that would give Ireland enforcement powers across the EU for an additional component of the digital economy. See Article 38 and Article 40 of Proposal for a regulation of the European Parliament and of the Council on a Single Market for Digital Services (digital services act) and amending directive 2000/31/EC, 15 December 2020 (URL: <https://eur-lex.europa.eu/legal-content/en/TXT/?qid=1608117147218&uri=COM%3A2020%3A825%3AFIN>).
- ¹⁸ § 1758A (b)(2)(C) of draft U.S. Senate Bill “Protecting Americans’ Data From Foreign Surveillance” (URL: <https://www.wyden.senate.gov/download/protecting-americans-data-from-foreign-surveillance-act-of-2021-bill-text>).
- ¹⁹ “Commerce Control List”, Bureau of Industry and Security, U.S. Department of Commerce (URL: <http://www.bis.doc.gov/index.php/regulations/export-administration-regulations-ear>).
- ²⁰ Section 15(1) of the Irish Data Protection Act 2018. Section 16(1) gives the Minister the power to designate the Chair.
- ²¹ “Internal problems exposed at Irish Data Protection Commission”, ICCL, 9 February 2021 (URL: <https://www.iccl.ie/news/internal-problems-exposed-at-irish-data-protection-commission/>).
- ²² 2016 Annual Report of the Data Protection Commissioner of Ireland, April 2016 (URL: <https://www.dataprotection.ie/sites/default/files/uploads/2018-11/Annual%20Report%202016.pdf>), p. 7.
- ²³ €615,121 spent from 2016-2000, with a further €450,000 requested for the project in 2021. See Letter Tom Walsh (DPC) to Johnny Ryan (ICCL), Regarding FOI Request – Decision Letter, 22 January 2021, pp 2-3; and “Data Protection Commission statement on funding in 2021 Budget”, Data Protection Commission, 13 October 2020 (URL: <https://www.dataprotection.ie/en/news-media/press-releases/data-protection-commission-statement-funding-2021-budget>), p. 23.